BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

CITIZENS FOR GOOD GOVERNANCE,

Petitioners,

v.

WALLA WALLA COUNTY,

Respondent,

And

FUTUREWISE, PORT OF WALLA WALLA

Intervenors.

Case No. 09-1-0013

ORDER FINDING COMPLIANCE
[Re: Critical Aquifer Recharge Areas]

I. SYNOPSIS

In 2010 and 2012, the Eastern Washington Growth Management Hearings Board found Walla Walla County out of compliance regarding the GMA's requirements to designate and protect areas with a critical recharging effect on aquifers used for potable water. In this 2013 proceeding, Petitioners challenge Walla Walla County's most recent compliance efforts relating to designation and protection of Critical Aquifer Recharge Areas (CARAs) and the requirement to include the Best Available Science in the record.

The Board finds and concludes that Walla Walla County has achieved compliance with the Growth Management Act as to the GMA's requirements to designate and protect areas with a critical recharging effect on aquifers used for potable water.

II. PROCEDURAL HISTORY

On May 3, 2010, the Eastern Washington Growth Management Hearings Board issued its Final Decision and Order in which the Board found and concluded that Walla

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Walla failed to designate and protect "Areas with a Critical Recharging Effect on Aquifers Used for Potable Water."

On January 9, 2012, Walla Walla County adopted Ordinance No. 409 (Compliance Ordinance) designating and protecting Critical Aquifer Recharge Areas.

On April 5, 2012, the Board issued a Compliance Order finding that out of nine legal arguments related to Critical Aquifer Recharge Areas, Walla Walla County remained out of compliance as to three issues.

On February 25, 2013, the Board of Walla Walla County Commissioners adopted Ordinance No. 414 in an attempt to achieve compliance with the Growth Management Act.[1]

On April 19, 2013, the Board conducted a telephonic Compliance Hearing, with Presiding Officer Raymond L. Paolella and Board members Charles Mosher and Margaret Pageler present. Jeffrey M. Eustis appeared on behalf of Petitioners, and Tim Trohimovich appeared on behalf of Intervenor Futurewise. Jesse Nolte represented Walla Walla County. Tadas Kisielius and Duncan Greene represented Intervenor Port of Walla Walla.

III. BURDEN OF PROOF

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.[2] After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.[3] For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA.[4]

[1] Walla Walla County's Statement of Actions Taken to Comply (Compliance Report), *Ex. 384* (October 30, 2012).
[2] RCW 36.70A.300(3)(b).
[3] RCW 36.70A.330(1) and (2).
[4] RCW 36.70A.320(1), (2), and (3).

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."[5]

Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth:

> The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the board to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.[6]

In sum, during compliance proceedings the burden remains on the Petitioner to overcome the presumption of validity and demonstrate that any action taken by the County is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW (the Growth Management Act).[7] Where not clearly erroneous and thus within the framework of state goals and requirements, the planning choices of the local government must be granted deference.

IV. APPLICABLE LAW

Each county shall designate where appropriate: "Critical areas." RCW 36.70A.170(1)(d). The term "Critical areas" is defined as including the following areas and ecosystems:

(a) wetlands;
(b) areas with a critical recharging effect on aquifers used for potable water;
(c) fish and wildlife habitat conservation areas;
(d) frequently flooded areas; and
(e) geologically hazardous areas.[8]

---

[5] *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
[6] RCW 36.70A.3201.
[7] RCW 36.70A.320(2).
[8] RCW 36.70A.030(5).

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Each county shall adopt development regulations that protect designated critical areas. RCW 36.70A.060(2). The term "development regulations" is defined as:

> . . . the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.[9]

Development regulations shall be consistent with and implement the comprehensive plan. RCW 36.70A.040(4)(d).[10]

In designating and protecting critical areas, the GMA requires that "counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries." RCW 36.70A.172(1).

Evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.[11] "Although BAS does not require the use of a particular methodology, at a minimum BAS requires the use of *a* scientific methodology."[12] Although a county need not develop scientific information through its own means, it must rely on scientific information and must analyze that information using a reasoned process.[13] Department of Commerce Guidelines state that a county should address on the record "the relevant sources of best available scientific information included in the decision-making."[14]

If a county chooses to disagree with or ignore scientific recommendations and resources provided by state agencies or Indian tribes, which a county could do, the county

---

[9] RCW 36.70A.030(7).
[10] See also RCW 36.70A.060(3), RCW 36.70A.120; and RCW 36.70A.130(1)(d).
[11] *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 96 Wn. App. 522, 532, 979 P.2d 864 (1999).
[12] *Ferry County v. Concerned Friends of Ferry County,* 155 Wn. 2d. 824, 837, 123 P.3d 102 (2005).
[13] *Id.* at 836-837.
[14] WAC 365-195-915(1)(b).

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

must unilaterally develop and obtain valid scientific information.[15] The GMA does not require a county to follow BAS; rather it is required to "include" BAS in its record. A county may depart from BAS if it provides a reasoned justification for such departure.[16]

RCW 36.70A.170(2) provides that in making critical areas designations, counties and cities shall consider the guidelines established by the Department of Commerce pursuant to RCW 36.70A.050(1). Under RCW 36.70A.050, these are "minimum guidelines" that apply to all jurisdictions "to guide the classification" of critical areas. The Department of Commerce "minimum guidelines" are codified in WAC Chapter 365-190.

WAC 365-190-030(3) defines Critical Aquifer Recharge Areas as follows:

> "Critical aquifer recharge areas" are areas with a critical recharging effect on aquifers used for potable water, including areas where an aquifer that is a source of drinking water is vulnerable to contamination that would affect the potability of the water, or is susceptible to reduced recharge.

WAC 365-190-100 states in pertinent part as follows:

> (1) Potable water is an essential life sustaining element for people and many other species. Much of Washington's drinking water comes from groundwater. Once groundwater is contaminated it is difficult, costly, and sometimes impossible to clean up. Preventing contamination is necessary to avoid exorbitant costs, hardships, and potential physical harm to people and ecosystems.
>
> (2) The quality and quantity of groundwater in an aquifer is inextricably linked to its recharge area. Where aquifers and their recharge areas have been studied, affected counties and cities should use this information as the basis for classifying and designating these areas. Where no specific studies have been done, counties and cities may use existing soil and surficial geologic information to determine where recharge areas exist. To determine the threat to groundwater quality, existing land use activities and their potential to lead to contamination should be evaluated.
>
> (3) Counties and cities must classify recharge areas for aquifers according to the aquifer vulnerability. Vulnerability is the combined effect of hydrogeological susceptibility to contamination and the contamination loading potential. High vulnerability is indicated by land uses that contribute directly or indirectly to contamination that may degrade groundwater, and

[15] *Id.* at 836.
[16] *Swinomish Indian Tribal Community v. WWGMHB, 1*61 Wn.2d 415, 430-431, 166 P.3d 1198 (2007).

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

hydrogeologic conditions that facilitate degradation. Low vulnerability is indicated by land uses that do not contribute contaminants that will degrade groundwater, and by hydrogeologic conditions that do not facilitate degradation. Hydrological conditions may include those induced by limited recharge of an aquifer. Reduced aquifer recharge from effective impervious surfaces may result in higher concentrations of contaminants than would otherwise occur.

(a) To characterize hydrogeologic susceptibility of the recharge area to contamination, counties and cities may consider the following physical characteristics:

(i) Depth to groundwater;
(ii) Aquifer properties such as hydraulic conductivity, gradients, and size;
(iii) Soil (texture, permeability, and contaminant attenuation properties);
(iv) Characteristics of the vadose zone including permeability and attenuation properties; and
(v) Other relevant factors.

(b) The following may be considered to evaluate vulnerability based on the contaminant loading potential:

(i) General land use;
(ii) Waste disposal sites;
(iii) Agriculture activities;
(iv) Well logs and water quality test results;
(v) Proximity to marine shorelines; and
(vi) Other information about the potential for contamination.

WAC 365-190-080(4) provides in pertinent part as follows:

> Counties and cities should designate critical areas by using maps and performance standards . . . However, because maps may be too inexact for regulatory purposes, counties and cities should rely primarily on performance standards to protect critical areas. Counties and cities should apply performance standards to protect critical areas when a land use permit decision is made.

"Protection" of Critical Areas means “preservation of the functions and values of the natural environment, or to safeguard the public from hazards to health and safety.” WAC 365-196-830(3). Development regulations must preserve the existing functions and values

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

of critical areas and may not allow a net loss of the functions and values of the ecosystem that includes the impacted or lost critical areas. WAC 365-196-830(4).

V. BOARD ANALYSIS

In designating and protecting Critical Aquifer Recharge Areas (CARAs), the County must (a) include and substantively consider Best Available Science, and (b) designate those areas which are vulnerable to contamination that would affect the potability of the water.

In the April 5, 2012, Compliance Order, the Board remanded to Walla Walla County to take legislative action to achieve compliance as to three remaining compliance issues:

- Include the Best Available Science regarding horizontal permeability underlying the airport; and determine whether or not the aquifer contamination risk at the airport satisfies the GMA's standard of being a vulnerable aquifer -- as indicated by the combined effect of land uses and hydrogeologic conditions that contribute directly or indirectly to or facilitate contamination of groundwater.

- Determine whether or not the Shallow Gravel Aquifer is vulnerable to contamination conveyed through Zone 2 recharge areas; and if vulnerability is found, classify/designate Zone 2 recharge areas according to whether or not the Shallow Gravel Aquifer is vulnerable to contamination from identified Zone 2 recharge areas.

- Either amend its regulations as to aquifer contamination threats from pre-existing non-conforming uses to reflect the inclusion of Best Available Science, or provide a reasoned justification for departing from the Best Available Science as to aquifer contamination threats from pre-existing non-conforming uses within CARAs.

A. Designation – Exclusion of the Airport from CARA.

On October 30, 2012, the County's Hydrogeologist at Golder Associates Inc. (Golder) issued a Technical Memorandum entitled *Response to Compliance Issues from Eastern Washington Region Growth Management Hearings Board – Walla Walla County Critical Aquifer Recharge Area*.[17] This Technical Memorandum analyzed the horizontal hydraulic conductivity of the Airport area. There is no site-specific horizontal hydraulic conductivity data for the Touchet Beds in the Airport area. However, Golder conducted a literature search and presented available scientific information showing Horizontal and Vertical

[17] Walla Walla County's Statement of Actions Taken to Comply (Compliance Report), *Ex. 361*.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Conductivity for the Touchet Beds.[18] The County Commissioners made detailed findings on horizontal permeability when they adopted Ordinance No. 414.[19] Additional scientific information was providing by Aspect Consulting, a hydrogeologic consultant retained by the Port of Walla Walla, which owns and operates the airport.[20]

Regarding aquifer contamination risk, Golder found the depth to groundwater was about 55 to 85 feet below the ground surface, and the Shallow Gravel Aquifer (SGA) is overlain by low to moderate permeability Touchet Beds consisting of rhythmically-bedded sand and silt. Based upon the available data, including well logs, Golder classified the Airport as having "Low" hydrogeologic susceptibility to contamination.[21]

Based upon zoning and the permitted uses at the Airport, Golder found there may be development or land uses in the airport zoning district that have the potential to impact groundwater quality if Best Management Practices or current hazardous substance regulations are not followed.[22] Outside of the area zoned as Airport Development (AD), most of the land use is agricultural with a low contaminant loading potential and there is a variable density of Group A and B wells and permit exempt wells in the moderate vulnerability area.[23]

Golder states there are no waste disposal sites at the Airport but there have been hazardous substance releases which have been, or are in the process of being remediated, and are not threats to groundwater. Golder found that the contaminant loading potential within the airport development zoning district is moderate. [24] Therefore, Golder concluded the overall vulnerability of the SGA to contamination should be classified as "Moderate" within the airport development zoning district.[25]

---

[18] *Id*. at 2-3.
[19] Walla Walla County's Statement of Actions Taken to Comply (Compliance Report), *Ex. 384*.
[20] Walla Walla County's Statement of Actions Taken to Comply (Compliance Report), *Ex. 383* [*Port of Walla Walla Airport, Critical Aquifer Recharge Area Delineation* (February 17, 2013)].
[21] Walla Walla County's Statement of Actions Taken to Comply (Compliance Report), *Ex. 361*, p. 4.
[22] *Id*. at 9.
[23] Walla Walla County's Statement of Actions Taken to Comply (Compliance Report), *Ex. 371*.
[24] *Id*. at 5.
[25] *Id*. at 6.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Under WAC 365-190-100(3), counties and cities must classify recharge areas for aquifers according to the aquifer vulnerability. Vulnerability is the combined effect of hydrogeological susceptibility to contamination and the contamination loading potential -- high vulnerability is indicated by land uses that contribute directly or indirectly to contamination that may degrade groundwater, and hydrogeologic conditions that facilitate degradation.

The County Commissioners made detailed findings and conclusions on aquifer vulnerability, including *inter alia*: under the WAC factors the aquifer does not meet the criteria for being highly vulnerable to contamination from the Airport; the Airport is not an area with a critical recharging effect on an aquifer used for potable water; and by adopting a moderate vulnerability zone with associated protections, the County will ensure that a site-specific review will occur for certain land uses, even though the Best Available Science does not indicate that a CARA designation is warranted.[26]

Petitioners challenge Ordinance No. 414 and allege that exclusion of the airport district from the CARA is not based on Best Available Science because it fails to protect the Shallow Gravel Aquifer for potable use.[27] Petitioners cite a January 26, 2012, Declaration of Dr. Robert Carson as stating that the Touchet Beds which underlie the airport are not a monolithic formation, but have inter-bedded sands that are horizontally and vertically permeable.[28] Petitioners also refer to a January 23, 2013 letter from Dr. Carson stating in part:

> Based on data in the soil survey manual (Harrison and others, 1964), the vertical hydraulic conductivity there is 0.8-2.5 inches per hour. This level of conductivity is generally accepted as sufficient permeability for septic drainfields. And if permeable enough for drainfields, it is permeable enough for contaminants to pollute our shallow aquifer . . . Considering that the airport area lies over our shallow aquifer, and that it is topographically uphill and hydrologically upvalley relative to our community, it should be in the CARA.[29]

---

[26] Walla Walla County's Statement of Actions Taken to Comply (Compliance Report), *Ex. 384*, pp. 13-14.
[27] Objections by Citizens for Good Governance and Futurewise to Walla Walla County's Compliance Report, p. 3 (March 25, 2013).
[28] *Id*. at p. 6.
[29] *Id*. at *Ex. 381*.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

The Board notes that Dr. Carson did not analyze the aquifer vulnerability criteria in WAC 365-190-100(3), and in particular did not explicitly consider the WAC standard: "Vulnerability is the combined effect of hydrogeological susceptibility to contamination and the contamination loading potential."

Petitioners' arguments for a CARA designation rely substantially on the history of two reported hazardous substance releases at previously remediated sites within the Airport District (Corps of Engineers Motor Pool and Walla Walla Airport sites)[30] and on the presence of a number of wells down-gradient (south) of the Airport.[31] Petitioners conclude that the Airport area should be designated as a CARA because of the presence of hazardous substances, the ability of the Touchet Beds to transmit hazardous substances, and past instances of actual contamination.

Petitioners also cite to the Golder scientific reports, and Petitioners did not refute the basic scientific information contained in the Golder reports. Petitioners did not come forward with additional scientific information that refutes the scientific information in the record and relied on by the County. Rather Petitioners disagree with Golder's conclusion and the County Commissioners' findings and conclusions that the overall vulnerability of the SGA to contamination was classified as "Moderate" within the airport development zoning district and, therefore, the airport area did not have high vulnerability to contamination and did not warrant a CARA designation.

The Board notes the CARA designation criteria under WAC 365-190-100(3) require assessment of aquifer vulnerability. Vulnerability is the combined effect of hydrogeological susceptibility to contamination and the contamination loading potential -- high vulnerability is indicated by land uses that contribute directly or indirectly to contamination that may degrade groundwater, and hydrogeologic conditions that facilitate degradation. Here the science in the record finds the hydrogeologic susceptibility is low and the contamination

[30] Walla Walla County's Statement of Actions Taken to Comply (Compliance Report), *Ex. 361*, p. 5.
[31] Objections by Citizens for Good Governance and Futurewise to Walla Walla County's Compliance Report, pp. 7-8.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

loading potential is moderate. In the absence of competing science from Petitioners, the Board finds the record supports the County's conclusion that vulnerability is not high.

As to exclusion of the Airport from the designated CARA, the Board finds and concludes that Petitioners have failed to satisfy their burden of proof to demonstrate that Ordinance No. 414 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.

B. Pre-Existing Non-Conforming Uses

Ordinance No. 414 made changes to the applicability section of the Critical Areas Code, WWCC 18.8.015, and added a new section regarding lawful or legal non-conforming uses, which clarifies that all land uses must abide by illicit discharge and Best Management Practices requirements.[32] Petitioners do not challenge this issue and agree that the County is in compliance with the GMA as to Pre-Existing Non-Conforming uses.

C. Board Findings and Conclusions

After reviewing all of the briefing and arguments of the parties and the scientific information in the record, the Board finds and concludes:

- Petitioners have failed to come forward with any additional scientific information that refutes the scientific information in the record and relied on by the Board of Walla Walla County Commissioners.
- The Findings of Fact made by the Board of Walla Walla County Commissioners in Ordinance No. 414 are supported by substantial scientific evidence in the record.
- The Conclusions of Law made by the Board of Walla Walla County Commissioners in Ordinance No. 414 are consistent with the GMA's criteria and standards for designating and protecting areas with a critical recharging effect on aquifers used for potable water.
- Petitioners have failed to satisfy their burden of proof to demonstrate that Ordinance No. 414 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.
- Walla Walla County is in compliance with the Growth Management Act relating to the designation and protection of Critical Aquifer Recharge Areas.

[32] Walla Walla County's Statement of Actions Taken to Comply (Compliance Report), *Ex. 384*.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

VI. ORDER

Based on the foregoing, the Board finds and concludes that Walla Walla County is in compliance with the requirements of the Growth Management Act relating to the designation and protection of Critical Aquifer Recharge Areas. This case is closed.

Entered this 3rd day of June, 2013.

_____
Raymond L. Paolella, Board Member

_____
Charles Mosher, Board Member

_____
Margaret Pageler, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[33]

[33] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253